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In the Supreme Court of the United States

OCTOBER TERM, 1958

EDGAR V. MAHER, PETITIONER

v.

HARRIS ELLSWORTH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a veterans preference granted to a Civil Service employee in 1942, pursuant to a Court of Appeals decision and Civil Service Commission ruling in compliance with that decision, is preserved by Section 18 of the Veterans' Preference Act of 1944.

STATUTES AND RULINGS INVOLVED

The pertinent statutory provisions and Civil Service Commission minutes are as follows:

1. Act of August 23, 1912, c. 350, Section 4, 37 Stat. 413:

> * * * in the event of any reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.

2. The Veterans' Preference Act, Act of June 27, 1944, c. 287, Section 18, 58 Stat. 391, 5 U.S.C. 867:

> * * * this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

3. Civil Service Commission Minute 1, June 10, 1931.

> Persons presenting discharges from draft are entitled to preference regardless of the length of their military service. * * *

4. Civil Service Commission Minute 2, May 20, 1954.

> * * * persons discharged from the draft in World War I * * * are entitled to preference under the prior law; and that under section 18 of the Veterans' Preference Act preference cannot be withdrawn if the employee was in the service on the date of the Act and has been continuously employed since that date without a break in service.

STATEMENT

Petitioner, who is employed as an adjudicator at the St. Louis, Missouri, office of the Veterans Administration, brought this suit to compel the Veterans Administration to restore him to a position in grade GS–11 from which he was reduced to a GS–9 grade on August 12, 1956, as a result of a reduction in force order (R. 9). Petitioner admittedly was entitled to the benefits of the Veterans' Preference Act of 1944, with seniority dating from 1945 (R. 9). His suit is based on the contention that veterans preference has erroneously been given to William A. Friedman, another employee in the same office, as a result of which he was retained at a GS–11 grade (R. 5–6). Without that preference, Friedman would have been on a different retention list and he, and not petitioner, would have been the employee forced to accept reduction in rank (R. 9). Friedman, who has worked for the Government continuously since 1942, has, since that date, been recognized by the Civil Service Commission as a veteran, entitled to statutory veterans employment benefits (R. 9).

That recognition was accorded on the basis of the following actions: Prior to 1931, the Civil Service Commission had not granted preferences to persons presenting discharge from the draft (in World War I) certificates. In 1931, in the case of *Hurley* v. *Crawley*, 60 App. D. C. 245, 50 F. 2d 1010, the Court of Appeals for the District of Columbia held that a person who had been inducted into the Army in World War I, and who had then been given a discharge from the draft because he was physically unqualified for military service, was entitled to a veterans preference under the laws existing at that time. (See 37 Stat. 413 and 40 Stat. 1291, as amended, 41 Stat. 37.) The Court of Appeals reasoned that, since a man who is inducted into the Army and has reported to camp is subject to all of the liabilities and loss of civilian rights which go with Army service, such a man is also entitled to the benefits granted by Congress and the President to those who are subjected to Army conditions. The term "honorably discharged" as used in the then preference acts was held to include any discharge given under honorable conditions, and not just the one certificate bearing the title "Honorable Discharge". Based on this decision, the Civil Service Commission granted preferences to employees, such as Friedman, having a discharge from the draft. See Minute 1, June 10, 1931, quoted *supra*, p. 2.

Following the decision of the Supreme Court in *Patterson* v. *Lamb*, 329 U. S. 539, which held that an inductee who got only as far as "the railroad platform" when the draft was cancelled was not entitled to an "honorable discharge" rather than a "discharge

from draft" certificate, the Civil Service Commission issued Minute No. 1 of April 11, 1947, withdrawing veterans preferences from those having a discharge from the draft. However, upon reconsidering this decision in the light of Section 18 of the Veterans' Preference Act of 1944, the Commission issued Minute No. 2 of May 20, 1954, *supra*, p. 3, granting veterans preferences to those having a discharge from the draft and employed in the civil service continuously from a time prior to the 1944 Act.

Thus, the situation when petitioner brought the present suit, was that, under *Hurley* v. *Crawley, supra,* and the Civil Service ruling based on that decision, a person having a discharge from the draft was entitled to a veterans preference, provided that such preference was granted prior to the 1944 Act, so as to be preserved by Section 18 of the 1944 Act.

The District Court, in its oral opinion in favor of petitioner, attempted to distinguish the *Crawley* case and also noted that it seemed absurd to allow a veteran with only a few days service the same rights as a veteran with several years of service (R. 13). The Court of Appeals reversed on the ground that the Civil Service Commission ruling in 1931 was correctly made in compliance with the *Crawley* decision and that the clear language of Section 18 of the 1944 Act preserved Friedman's preference granted pursuant to the 1931 ruling, prior to the 1944 Act (Pet. 16–17).

ARGUMENT

Petitioner's contentions are essentially (1) that the Court of Appeals for the District of Columbia

Circuit misinterpreted its own decision in *Hurley* v. *Crawley, supra*; (2) that the *Crawley* decision was incorrect and the Civil Service Commission should not have complied with the mandate of the Court of Appeals in 1931; and (3) that the clear language of Section 18 of the Veterans' Preference Act of 1944, *supra*, p. 2, is not controlling. These contentions do not present substantial questions; there are no conflicts with other cases; and the issue is a narrow and unimportant one. Accordingly, further review by this Court is unwarranted.

1. The ruling of the Civil Service Commission in 1931 was made pursuant to a final and controlling decision by the Court of Appeals for the District of Columbia in the *Crawley* case. In this suit the Court of Appeals has dispelled any doubts as to the meaning of its decision in *Crawley* and has expressly affirmed the meaning given that case by the Civil Service Commission.

Later decisions by the Court of Appeals and this Court do not conflict with the instant decision. In *Patterson* v. *Lamb*, 329 U. S. 539, the issue was whether an inductee whose sole military duty was reporting to the railroad platform for transportation to a military camp, and who was then sent home because of the World War I armistice, was entitled to an honorable discharge certificate for his military service instead of the discharge from draft certificate which had been issued to him. This Court held that the type of discharge granted was discretionary with the Secretary of War and that the discharge given was

correct.[1] Lamb desired the honorable discharge because of its impact on certain state taxes; the veterans federal-employment legislation of Congress was not in issue.

In the 1952 case of *McDougall* v. *United States Civil Service Commission*, 92 U. S. App. D. C. 69, 202 F. 2d 361, certiorari denied, 345 U. S. 969, the Court of Appeals held that a person presenting a discharge from the draft was not entitled to veterans preference claimed under the general "ex-serviceman" provisions of Section 2 of the 1944 Act.[2] The preference was first claimed after the passage of the 1944 Act and no mention was made of, or reliance placed upon, the previous acts, Section 18 of the 1944 Act, or the *Crawley* decision. Only the general terms of Section 2 of the 1944 Act were involved.

In deciding *McDougall*, the Court of Appeals relied in part on the case of *Mitchell* v. *Cohen*, 333 U. S. 411, but that case was also based on the 1944 Act and the term "ex-serviceman" as it applied to a member of the Voluntary Port Security Force of the Coast Guard Reserve. In commenting on the issue presented in the present case, this Court in *Mitchell* v. *Cohen* recognized the validity of preferences granted

[1] In *Davis* v. *Woodring*, 72 App. D. C. 83, 111 F. 2d 523, the Court of Appeals for the District of Columbia, while refusing to change a discharge from the draft to an honorable discharge, expressly recognized that the service leading to the discharge from the draft had been under "honorable conditions." 111 F. 2d 523, 525.

[2] Section 2 covers, *inter alia*, "(4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition * * *".

by Civil Service Commission rules and regulations prior to the 1944 Act. 333 U. S. 411, 422, 423.

2. Petitioner also argues, as he did below, that a literal reading of the clear language in Section 18 of the 1944 Act, *supra*, p. 2, would result in an absurdity by allowing a veteran with a short period of military service a preference as absolute as that of veterans with a much longer period of service. If Congress had felt that such a difference should be recognized, it would have so molded the statute. The possible unfairness of granting equal preferences was carefully pointed out to Congress before the 1944 Act, but Congress nevertheless passed the Act without making any allowances for differences in length of service.[3] As the Court of Appeals recognized, the statute preserves preferences granted prior to 1944 in the clear and unambiguous language of Section 18 of the 1944 Act. The preference granted to Friedman in 1942, pursuant to the Court of Appeals *Crawley* decision in 1931, was accordingly preserved.

3. The question presented is a restricted one, relating only to World War I veterans with discharges from the draft who had been granted veterans preference prior to the 1944 Act. On that issue the ruling of the District of Columbia Circuit is sufficient.

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[3] See *Hilton* v. *Sullivan*, 334 U. S. 323, in which this Court reviewed the hearings of the Senate Committee in which this unfairness was urged. It was pointed out to the Senate Committee that the 1944 Act would be "'substantially the same' as the 1912 Act, which, as before pointed out, provided for an absolute veterans' retention preference without regard to length of service." 334 U. S. 323, 338.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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